Supreme Court, U.S.
FILED
MAY 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1699

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

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GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND FOR SHAUNA MARIE ELLIOTT, A MINOR,
Appellants,

versus

DR. MARCIAL LEWIN AND HILLCREST BAPTIST HOSPITAL,
Appellees

*

On Appeal From The Supreme Court
of the State of Texas

*

APPELLANTS' RESPONSE TO MOTION OF HILLCREST BAPTIST HOSPITAL FOR DAMAGES AND DOUBLE COSTS

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TO THE HONORABLE UNITED STATES SUPREME COURT:

Comes Now Appellants and in response to motion of Hillcrest Baptist Hospital for damages and double costs, would show:

I.

Without any question, this appeal is not

frivolous because: (a) as reflected in Appellants' Jurisdictional Statement and Appellants' Response to Appellees' Motion to Dismiss or Affirm, both being referred to and incorporated herein by reference, this case involves substantial constitutional and due process questions of whether Rule 215 of the Texas Rules of Civil Procedure, as applied in this case, and as written is unconstitutional and whether the Texas appellate courts, in refusing to consider (to the extent that they did so) Appellants' appeal on its merits, violated Appellants' due process and equal protection rights under the United States Constitution; and a substantial question is involved and determining whether the alleged state ground for affirming the unconstitutional dismissal of the Appellants' case by the trial court - namely the failure to have a "Statement of Facts" filed when in fact none was needed for a disposition of Appellants' appeal on the merits - is an independent and adequate state ground. (b)

Appellees' assertion that Appellants' did not timely and properly raise the unconstitutionality of Rule 215 as applied in the state courts is in itself a frivolous assertion and constitutes a gross mistatement of the record that existed before the state courts. (See Supplemental Appendicies and Appellants' Response to Appellees' Motion to Dismiss or Affirm). (c) There is a substantial and extremely important question in this case of whether or not the disposition of this case in the state courts rested "squarely and expressly on an adequate nonfederal basis" and, as can be seen from Appellants' response to Appellees' Motion to Dismiss or Affirm, the alleged nonfederal ground used in this case by the state appellate courts - namely the failure to have a Statement of Facts when in fact none was needed and the appellate courts had before them the official Transcript of the trial court proceedings which was sufficient in itself to enable the appellate courts to

determine that Rule 215 had been unconstitutionally applied in this case - does not pass muster in the face of a number of varied tests that the Supreme Court has employed to determine whether an alleged nonfederal ground is in fact adequate. (See Appellants' Response to Appellees' Motions to Dismiss or Affirm). Therefore, the Appellees' request for damages and double costs should be in all things denied.

II.

Because of Appellees' gross mistatements of the record in their Motions to Dismiss or Affirm, Appellants' are tempted to request damages of double costs from Appellees but consistent with this counsel's philosophy concerning sanctions and similar proceedings, particularly how such efforts are clogging our court systems and deterring innovative practice of the law, we will not make such a motion.

WHEREFORE, Appellants' pray the Court to deny the Appellees' motion for damages and

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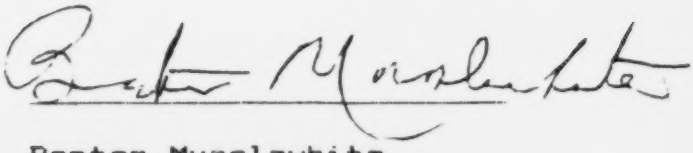
double costs.

Respectfully submitted,



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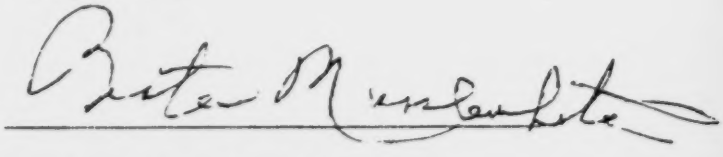
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been this day placed in the United States Mail, postage prepaid and appropriately addressed to Appellees' attorney of record.

Dated: May 23, 1988.



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